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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 255

WALTER CHAPLINSKY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

FRANK R. KENISON,
Attorney-General,
State House,
Concord, N. H.;
ERNEST R. D'AMOURS,
Assistant Attorney-General;
JOHN F. BEAMIS, JR.,
County Solicitor,
Counsel for Appellee.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1
Statement of the case	1
Argument	2
Motion to dismiss or affirm	7

Table of Cases Cited.

Cantwell v. *Conn.*, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940) 3

Gitlow v. *New York*, 268 U. S. 652, 666, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925) 4

Hague v. *Committee for Industrial Organization*, 307 U. S. 496, 515, 516, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939) 3

Hussock v. *People of the State of New York*, 311 U. S. 659, 61 Sup. Ct. 733, 85 L. Ed. 642 (1941) 2

Langston v. *South Carolina*, 311 U. S. 685, 61 Sup. Ct. 59, 85 L. Ed. 75 (1940) 2

State v. *Chaplinsky*, 91 N. H. —, 18 A. (2d) 754 (decided March 4, 1941) 2

Thornhill v. *Alabama*, 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940) 4

Watch Tower Bible & Tract Society v. *City of Bristol*, 305 U. S. 572, 59 Sup. Ct. 246, 83 L. Ed. 361 (1938) 2

Whitney v. *Cal.*, 274 U. S. 357, 373, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927) 4

Statute Cited.

N. H. Pub. L., Chap. 378, s. 2 1, 2

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Appellee.

APPEAL FROM THE NEW HAMPSHIRE SUPREME COURT.

APPELLEE'S STATEMENT OPPOSING JURISDICTION.

Pursuant to Rule 12, paragraph 3, Rules of the Supreme Court of the United States, comes now The State of New Hampshire, appellee, in the above entitled case and discloses the following matter making against the jurisdiction of the Supreme Court of the United States as asserted in a statement of the basis of appellate jurisdiction filed by the appellant on June 2, 1941.

Statement of the Case.

Complaint for violation of P. L. c. 378, s. 2. Trial by jury. Verdict of guilty. Divers exceptions taken by the

appellant. Exceptions were overruled in *State* v. *Chaplinsky*, 91 N. H. —, 18 A. 2d. 754 (Decided Mar. 4, 1941) which upheld the conviction of guilty and held that the statute in question was constitutional under the First and Fourteenth Amendments of the United States Constitution.

The complaint alleged in substance that with force and arms, in a public place in Rochester, on Wakefield Street, near the City Hall, the respondent addressed to the City Marshal these offensive, derisive and annoying words; 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester, are Fascists or agents of Fascists'. These words were testified to by several of the State's witnesses. The defendant admitted the words with the exception of the qualifying "God".

The statute (N. H. Pub. L. c. 378, s. 2) involved reads thus:

> "2. No person shall address an offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

Argument.

(I) It is submitted by the appellee that the appeal should be dismissed for want of a substantial Federal question.

Watch Tower Bible & Tract Society v. *City of Bristol*, 305 U. S. 572, 59 S. Ct. 246, 83 L. Ed. 361 (1938);
Langston v. *South Carolina*, 311 U. S. 685, 61 S. Ct. 59, 85 L. Ed. 75 (1940);
Hussock v. *People of the State of New York*, 311 U. S. 659, 61 S. Ct. 733, 85 L. Ed. 642 (1941).

(II) The right of the state under its police power to legislate against conduct likely to cause a public breach of

the peace with a view to securing the social interest in an orderly and tranquil society, has never been questioned in the decisions of the United States Supreme Court. On the contrary, for a long time such a power has been taken for granted.

In *Cantwell* v. *Conn.*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), the Court said at pages 308 and 310:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the state to prevent or punish is obvious. • • • 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution and its punishment as a criminal act would raise no question under that instrument'."

And in *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515, 516, 59 S. Ct. 954, 83 L. Ed. 1423 (1939), the Court stated:

> "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interests of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; • • •."

The denial of certiorari in *Langston* v. *South Carolina* and in *Hussock* v. *People of the State of New York*, *supra*,

may well be considered as a by-product of the above quoted language.

We have here a case where clearly there can be no claim for an opportunity to test the merits of ideas by competition in the market of public opinion. See *Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). To address offensive names to another in a public place is obviously not under the wing of constitutional protection of peaceful and truthful discussion of matters of public interest. Such verbal conduct can only invite personal violence and disturbance of the peace. Public debate does not yet include public name-calling.

Gitlow v. *New York*, 268 U. S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925);

Whitney v. *Cal.*, 274 U. S. 357, 373, 47 S. Ct. 641, 71 L. Ed. 1095 (1927).

(III) The statute is not invalid because of any vagueness or indefiniteness in its terms.

In the opinion of the New Hampshire Supreme Court in the instant case it was said:

> "In this connection, the claim is made that the test of what is offensive is purely subjective in the sense that it is to be determined by the way the addressee reacts to it. The defendant therefore argues that nobody can know what is offensive language, since one man may be offended by words to which another man would take no exception. We have never construed the statute by any such test. The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The legislature had no such vague, shifting test in mind. As was long ago said, they had in mind the tendency of words, not their actual result. the analogy was that of the distinction between civil and criminal libel. *State v. Brown*, 68 N. H. 200.
>
> "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. We have never applied the statute

otherwise. The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. In common understanding they are offensive in the Websterian sense of being such as to cause resentment, or, as Funk and Wagnalls say perhaps more aptly, adapted to give offense, offense being that which causes anger. Such words, as ordinary men know, are likely to cause a fight. So are threatening profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. If the time may ever come when the words 'damned Fascist' will cease to be generally regarded as 'fighting words' when applied face-to-face to an average American, this is not the time. The presiding justice might have been warranted in telling the jury that they were offensive as a matter of law. But since he thought the jury as competent as he to understand the words, he left the question to them.

"The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker —including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats. Men of common intelligence, situated as was Chaplinsky, do not need to guess at its meaning or differ as to its application. See *Connally* v. *Company*, 269 U. S. 385, 391. If the defendant or others might have guessed that less than such words were prohibited, or if they might have differed about what other words, if any, came under the ban, it was open to all to know, as we have heretofore held, that it could not apply except to words likely to cause a breach of the peace when addressed to an individual in a public place. Within the ambit of the statute, one does not

need to guess at what is prohibited, for all men of common intelligence know almost instinctively what are the dangerous words when so addressed.

"The holding of this statute as sufficiently definite is believed to be consistent with the decisions in *Stromberg* v. *California*, 283 U. S. 359, 369 (where the construction given included in the prohibition a fair use of constitutional freedom), in *Herndon* v. *Lowry*, 301 U. S. 242 (where defendants were obliged to exercise the gift of prophecy in order to know the application of the statute), in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (where the defendant did not have the benefit of a permissible construction prior to the act with which he was charged), and in *Thornhill* v. *Alabama*, 310 U. S. 88 (where the prohibition extended to the use of words 'without annoyance or threat of any kind')."

The statute under attack is far different from those requiring a license or a permit to exercise certain privileges in public places. No license or permit is involved in this statute. It simply provides for the punishment of verbal conduct calculated to produce a breach of the peace.

It is, therefore, submitted that this appeal should be dismissed or the judgment below affirmed.

Respectfully,

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ERNEST R. D'AMOURS,
Assistant Attorney-General,
JOHN F. BEAMIS, JR.
County Solicitor.

June 21, 1941.

SUPREME COURT OF THE UNITED STATES

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No. 255

WALTER CHAPLINSKY,

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THE STATE OF NEW HAMPSHIRE,

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APPEAL FROM NEW HAMPSHIRE SUPREME COURT.

MOTION TO DISMISS OR AFFIRM.

Now comes The State of New Hampshire, the appellee, herein, by Frank R. Kenison, its duly appointed, qualified and acting Attorney-General, and moves the Supreme Court of the United States to dismiss with costs the appeal taken herein, to wit, by Walter Chaplinsky, appellant, upon the following grounds:

(1) There is want of a substantial Federal question.

(2) It is manifest that the only Federal questions raised by the said appeal have been so explicitly decided by the Supreme Court of the United States in accordance with the decisions of the Supreme Court of the State of New Hampshire, as to foreclose further argument on the subject.

(3) It is clear that the decision of the Supreme Court of the State of New Hampshire, affirming the convictions of guilty, denying the appellant's exceptions and upholding the constitutionality of the New Hampshire statute is correct.

In the alternative, appellee moves this Court to affirm the judgment from which the appeal in the above entitled cause purports to be taken on the three grounds heretofore mentioned in the appellee's motion to dismiss.

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